United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 74-2026

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

MILTON COHEN, BERNARD DEUTSCH
and STANLEY DUBOFF,
Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT COHEN

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QUESTIONS PRESENTED

1. Was Cohen convicted on a charge not laid in the information?

2. Was there a fatal variance in that multiple conspiracies were proved and did the court err in giving the all or nothing charge in the circumstances of this case?

3. Should Cohen's case have been severed because of evidence of conduct by his co-defendants with which he was not connected?

4. Was the evidence as to Cohen sufficient?

5. Was Exhibit 48 showing Cohen's profits on his insider sales properly admitted in the context of this case?

6. Was it error for the court to permit the introduction into evidence of the Richard Packing trading account with New Dimensions?

7. Was it error for the court to admit evidence of the losses sustained by the Denver Funds?

8. Was Cohen's offer to prove his efforts to secure Surnow's attendance as a witness improperly excluded?

9. Was the prosecutor's summation improper and did the court err in its refusal to take corrective action as

requested with respect thereto

10 Did the trial court err in refusing to charge as requested and in its charge?*

STATEMENT OF THE CASE

A. Introductory

Cohen appeals from a judgment of conviction and sentence which was entered against him on July 16, 1974 after a seven week trial before Hon. Robert J. Ward, United States District Judge and a jury in the Southern District of New York. Cohen and his co-defendants were convicted on all counts of a four count information which charged a conspiracy to violate the securities laws of the United States prohibiting the issuance of false offering circulars in connection with Regulation A offerings and related substantive offenses.*

Cohen received a prison sentence of six months on all counts to run concurrently. His co-defendants each received prison sentences of three years to run concurrently and all of the defendants have been enlarged on bail pending this appeal.

B. The Information and the Bills of Particulars

The four count information in this case, with the exception of count 3, centered on the alleged falsity of an offering circular in connection with a Regulation A offering of 10,000 shares of Richard Packing Company stock in March, 1969.

Count 1, the conspiracy count, charges that Deutsch and Duboff, registered representatives with Jaffee & Co., a

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*We rely to the extent applicable on the points made by the co-appellants herein.

*At the court's suggestion, the defendants consented to be prosecuted under a superseding information which, by combining mailing counts, substantially reduced the number of counts in the original indictment. (Tr. of 4/22/74). The original indictment has since been nolled.

brokerage house, conspired with Cohen, president of Richard Packing Co. and with others named as co-conspirators but not as defendants, to violate the provisions of the 1933 and 1934 Securities Act embodied in 15 U.S.C. sections 77q, 77j, Rule 256(e) (17 C.F.R. section 230.256), 78j (b), Rule 10b-5 (17 C.F.R. 240.10 b-5) and the Mail Fraud and Aiding and Abetting statutes, to wit, 18 U.S.C. sections 1341 and 2.

Preliminarily it is alleged that between July, 1968 and March, 1969 approximately 100,000 shares of Richard Packing stock were traded in the over-the-counter market and that on or about March 11, 1969, Richard Packing issued an offering circular for an additional 10,000 shares.

It is then alleged in language which tracks the language of the statutes involved that the conspiracy existed from on or about July, 1968 to July, 1970 in connection with the aforesaid March 11, 1969 offering circular and that pursuant thereto schemes and artifices to defraud and manipulative devices were employed. A number of means whereby the conspiracy was carried out are then alleged which may be summarized as follows:

1. The March 11, 1969 offering circular was allegedly false in purporting to be a public offering when the stock was being sold to accounts which Deutsch and Duboff controlled; in failing to disclose that Deutsch and Duboff and co-conspirators Shwidock and his company, Kelly Andrews & Bradley were underwriters for the offering who were receiving compensation; and in failing to disclose that the proceeds of the offering were pre-determined and that Deutsch and Duboff were receiving and would receive, in connection with the offering, payment for their services consisting of stock options and common stock of the company. It is further alleged that the false offering circular was mailed to various persons in March, 1969.

2. The defendants allegedly arranged with co-conspirators Shwidock and Kelly Andrews and Bradley to sell the March 11, 1969 offering to accounts which Deutsch

and Duboff controlled.

3. As allegedly manipulative activity, Deutsch and Duboff induced certain mutual funds in Denver, Colorado (hereinafter the Denver Funds), to buy Richard Packing from accounts which they controlled so as to restrict the supply and create the appearances of market activity and demand.

4. Allegedly Deutsch and Duboff arranged with Shwidock and Kelly, Andrews to trade the stock as directed by them and to split their profits with them so that Deutsch and Duboff obtained secret kickbacks or profits amounting to approximately $15,000.

5. Allegedly these manipulative activities caused the price of Richard Packing to rise from $25.00 a share to approximately $53.00 a share and further caused the Denver Funds to lose approximately 5 million dollars as a result of their investments.

The count concludes with a number of overt acts principally involving the mailing of confirmations and offering circulars in connection with the March 11, 1969 offering.

Count 2 tracks the language of 15 U.S.C. section 77q, incorporates by reference the means paragraphs of the conspiracy count and alleges that the mailings of confirmations and offering circulars in connection with the March 11, 1969 offering were in contravention of that statute and of the aiding and abetting statute.

Count 3 is identical with Count 2 except that the single mailing alleged therein is alleged to have occurred on November 6, 1969, long after the offering of March 11, 1969 had been completed.

Count 4 is predicated on the alleged falsity of the March 11, 1969 offering circular and on the mailings set forth in Counts 2 and 3. As noted immediately above, the single mailing alleged in Count 3 occurred long after the March 11, 1969 offering.

The government furnished a bill of particulars and an

amended bill. Neither bill set forth any details describing the alleged scheme and artifice to defraud, the allegedly false representations referred to in paragraph 8 of the information or the manipulative devices referred to in paragraph 10.

We contend, among other things, that this confusing information charged a conspiracy to issue a false offering circular. The court took the mistaken view throughout the case that it charged a plot to keep the Denver Funds purchasing Richard Packing stock by false representations and by manipulative devices designed to create market activity, nowhere alleged or described in the information. As will be seen the court left it to the jury to decide what the object of the conspiracy was without any guidance on the subject except for a mere reading of the confusing information and some references to the supposed victimization of the Denver Funds (1550 et seq.)*

C. The Background

In 1967 Richard Packing Co. of St. Paul, Minnesota went public with an issue of 100,000 shares pursuant to a Regulation A offering (119). The offering circular (Cohen Ex. A) described the company as being engaged in processing and selling meat and meat products. Cohen and his brother Harvey, among others, were directors (119) and each held 187,500 restricted shares of the company stock after the offering had been completed (224-225).

In the summer of 1968 Cohen discussed a change in direction for the company with Malmon, a director of the company and the attorney who had incorporated the company and handled the Regulation A offering (116, 118-119). Cohen wanted to go into the fast food franchising business in an operationg similar to McDonald's. The concept was being developed by Status Marketing Inc., headed by Ward who had been with Diners Club, and

*References, unless otherwise noted are to pages of the Joint Appendix.

which would be engaged in selling franchises. The financing was to be done with the assistance of Deutsch, a New York stockbroker with Jaffee & Co., who, to Malmon's knowledge, had for some time been acting as financial advisor to the comapny (198A-199) and was helping to find market makers for its stock (120-121a). In October 1968 Deutsch in a telephone call to Malmon said that the financing for the new venture should be obtained through a second Regulation A offering of not more than $300,000 (121a-121b). The offering, as will be seen, was made in March, 1969.

Meanwhile, Deutsch commenced helping Cohen in connection with the latter's dream of making Richard Packing a second McDonald's through a "Circus Wagon" concept for which franchises would be sold nation-wide for Circus Wagon restaurants that would serve hamburgers and other fast foods (237).

As will be seen, the government's proof about the activities of Deutsch and his partner Duboff (618) in supposedly helping Cohen, accounted for most of the evidence at the trial and involved matters that went far beyond the allegations of the information which had *focused on the March 11, 1969 offering circular.*

The thrust of the government's case which led to innumerable motions on Cohen's part for a mistrial or a severance as early as the government's opening statement (102-103, Ct. Ex. 1 at 1745) was that Deutsch and Duboff through deals with which Cohen admittedly had nothing to do, had directed trades in Richard Packing prior to the offering for their own secret enrichment; had engineered the March 11, 1969 offering for their own secret enrichment and finally had contrived by false representations to have three mutual funds in Denver purchase 75% of the floating supply of Richard Packing stock, again for their own secret enrichment. The evidence against Cohen (Point IV) failed to connect him with any wrong-doing.

D. The March 11, 1969 Offering

After the second Regulation A offering had been decided upon as above set forth, Malmon met with Cohen and started preparation of the offering circular on the basis of the 1967 offering circular and on the basis of other information which Cohen gave him. Cohen told him that there would be no underwriter, that the stock would be sold by officers and directors of the company, predominantly himself, and that he was going to get some help with prospects from Deutsch (121d). Malmon proceeded on these instructions and ultimately the offering was cleared by the SEC to be effective on March 11, 1969 (GX 9a at 1774). As will be seen, Cohen and Malmon were used as patsys by Deutsch and Duboff in the offering which the latter secretly engineered and controlled.

The offering circular (GX 5b at 1750) stated on its face that the offering was to be made at the market with a maximum dealer concession of $1.00 per share for an aggregate of $10,000 in dealer concessions.

With respect to underwriting the offering circular stated:

> "The offering is not underwritten and the Company proposes to offer the shares through solicitation * * * by its directors and officers and employees who will receive no commission for such sales. The shares may also be offered through certain securities dealers who are members of the Association of Securities Dealers Inc. who will not be under any obligation to subscribe * * * *Any participating securities dealer may be deemed to be an "underwriter" within the meaning of the Securities Act of 1933 as Amended*". (emphasis supplied).

At page 3 of the offering circular under the heading "Offering Plan" it is stated in pertinent part:

> "In the event that brokers or securities dealers

> are employed, the Company's notification statement and offering circular will be promptly amended to furnish additional information".

In connection with the allegation in paragraph 11(g) (5) of the information about stock options for Deutsch and Duboff for their services to the Company including the offering, Page 9 of the offering circular summarizes the options which had been issued by the company and details only those which had been issued to Malmon. The options had been granted to a number of persons including Morganstin and Harris, relatives and nominees of Deutsch and Duboff (381, 384, 1117). Corporate resolutions convering the aforesaid options were prepared by Malmon on September 10, 1968 (GX 6 at 1768) over a month before there had been any talk of the 10,000 offering (121a-121b).

While Malmon testified that Cohen had told him the options were for services rendered to the corporation and to be rendered to the corporation of a financial nature and in connection with the establishment of the company's franchise program (128-129), there was no evidence, especially in light of the time element mentioned above, that the options which had been granted to the nominees of Deutsch and Duboff had anything to do with the help Deutsch and Duboff were to render in connection with the offering nor was there any evidence that Cohen had instructed Malmon to omit a listing of the names of the option holders in the offering circular. Indeed Malmon testified that neither Cohen nor Deutsch ever asked him to leave anything out of the offering circular (220).

The reference in paragraph 11(g)(5) of the information to the alleged failure of the offering circular to set forth that Deutsch and Duboff were to receive compensation in the form of common stock relates to letter stock which Deutsch and Duboff received from the Cohen brothers in October 1969 (GX 8 at 1771, Cohen Exs. I, J) but there was no evidence that those gifts were in contemplation in March of 1969. Indeed the prosecutor agreed that not-

withstanding the allegation in the information, the gifts of stock had nothing to do with the offering (215).

Although Malmon knew about a private placement of the stock of Richard Packing with a Value Line mutual fund on March 4, 1969 and acknowledged that a description of the deal would have helped the offering, he said nothing about it in the offering circular (167). The private placement which had been agreed upon in February 1969 involved a purchase by Value Line of 50,000 shares of Richard Packing Stock for $25 a share for a total investment of 1.4 million dollars (874).*

In the meanwhile, in September 1968, without any evidence linking Cohen to their activities (323), Deutsch and Duboff had entered into a corrupt arrangement with Shwidock and his brokerage firm, Kelly Andrews and Bradley, which lasted until May 1969. In exchange for secret kickbacks of 30% of the profits on the trading of stocks in which they were interested, including Richard Packing, Shwidock agreed to trade Richard Packing stock as directed by Deutsch and Duboff (335, 337, 344).

In January 1969, Deutsch told Shwidock about the proposed Richard Packing offering and said Shwidock was to be the underwriter (363). However, at a later date Deutsch told him that there was to be no underwriter; the role of Kelly, Andrews was simply to send out the confirmations (365).The amount Richard Packing was to receive from the offering was agreed upon among Shwidock, Deutsch and Duboff (cf. 1522). However, at Shwidock's request, Cohen wrote Shwidock a letter about the offering dated March 5, 1969, reading in pertinent part as follows (Cohen Ex. F at 2127):

> "As per our conversation we expect that the registration of 10,000 shares of Richard Packing Co. should be effective around the week of March 10. I would appreciate your handling of the sale.

*This had come about because Deutsch had actively pushed the deal in his conversations with O'Meara of Value Line (876-877, GX 2).

We would not expect to get less than $28.00 per share."*

Thereafter, pursuant to instructions from Duboff to which Cohen was not linked in any way, Shwidock billed out the 10,000 shares over a period of days in the manner depicted in a chart, GX 47 at 1887. 5,000 shares went to Jaffee & Co. for resale to one of the Denver Funds as hereinafter described. Shwidock's company, Kelly Andrews and Bradley took down 2,000 shares and the remaining 3,000 shares went to Morganstin and Harris, relatives and nominees of Deutsch and Duboff. The government claimed that the profits made on the subsequent sales by Kelly, Andrews and the nominees constituted the unrevealed compensation derived by Deutsch and Duboff and Kelly, Andrews as alleged in paragraph 11(g)(2) of the information (1524).

The transaction involving the sale of the 5,000 shares to the Denver Funds through Jaffee came about through Deutsch's acquaintanceship with Hurley who was the protfolio manager of Financial Venture Fund (FVF), one of three funds operating under the umbrella of Financial Programs, Inc. of Denver, Colorado, all of which ultimately became heavy investors in Richard Packing stock. FVF had 45 million dollars for investment in unseasoned companies and venturesome investments (608-609, 603). The other two funds were Financial Dynamics Fund (FDF) which was larger than Hurley's fund and Financial Industrial Fund (FIF) which had 500 million to invest (681-682).

Deutsch had met Hurley in late 1968 or early 1969 at the suggestion of Hugh Deane, a broker with institutional accounts who had become interested in the Richard Packing Circus Wagon concept and had invested in the

*There was no contention by the government at trial that there was anything wrong with the $28 figure as far as the market price stipulated in the offering circular was concerned, and Malmon testified that the price Cohen fixed was proper as long as the proceeds were less than $300,000 (171).

company for himself and his clients (234, 256).

At their first meeting Deutsch had told Hurley about Richard Packing and its plans and had given him some earnings projections (610, GX 33 at 1882). Thereafter in February or early March, 1969, Deutsch called Hurley, told him about the Richard Packing offering and about the availability of some of the shares for the funds. Hurley bought 5,000 shares of the offering for his fund at $28 per share — the same shares which Shwidock, as described above, had been directed by Duboff to sell to Jaffee & Co. for 28 1/2 on March 18, 1969 (616, 374). Cohen only met Hurley after this (617-618), and there is no evidence that Cohen even knew of his existence in March, 1969.

Cohen's only role in the offering, outside of writing the letter to Shwidock described above, was to arrange for the transfer to Kelly Andrews and Bradley of the Richard Packing shares involved in the offering. He gave appropriate written instructions to the transfer agent which in turn communicated with Malmon as company counsel and pursuant to Cohen's instructions and Malmon's opinion, 10,000 shares of the Company's stock were transferred to Kelly Andrews and Bradley (GX 9a, 9b and 9c at 1774-1779).

Although Malmon knew through writing his opinion letter that the 10,000 shares were being transferred to the brokerage house of Kelly Andrews and had known that Deutsch, a broker, was to help with the issue (121d,210) he made no inquiry (177) which could have led to filing an amendment to the offering circular which had stated (GX 5b, p. 3 at 1752) that "In the event that brokers or securities dealers are employed, the company's notification statement and offering circular will be promptly amended to furnish additional information". Indeed Malmon acknowledged that he gave no thought to the underwriting problem when in February, 1970 he answered "None" on an SEC 2a form (GX 5c at 1766) which stated in pertinent part "List the names and addresses of all brokers and

dealers who have, to the knowledge of the issuer or underwriters, participated in the distribution of the securities offered during the period covered by this report" (208-209). He testified that nobody concealed the role of Kelly, Andrews from him and he admitted that although he knew Kelly, Andrews was "somehow involved" he did not initiate any move to make an amendment (212-213) nor ask Cohen what the role of Kelly, Andrews had been (221).

At trial, Malmon gave it as his expert opinion that Kelly, Andrews was not an underwriter if they "in fact served the function of only billing and did not find the prospective buyers" (209). Shwidock denied at trial that his company was an underwriter and asserted it was only a billing agent (399). However Mrs. Appleton of the SEC, called by the government, gave it as her expert opinion, over objection (531-554), that Kelly, Andrews was an underwriter and should have been disclosed as such (561-563, 591). She acknowledged, however, that a business man would not be expected to be familiar with the various interpretations of the securities law and would have to rely on counsel (570-571, 592-593).

The court over objection (1449-1450) charged the jury about the definition of an underwriter set forth in the statute, 15 U.S.C. section 77b (1594-1596).

As will be seen in the next section, the further government proof ranged far beyond the events in March and April 1969 involving the offering.

E. The Government's Further Proof

Although the alleged falsity of the March 11, 1969 offering circular was the heart of the case, the government's proof went far beyond the events of March and early April, 1969. The government in its opening, which provoked motions for a mistrial on the ground that no such charges were embodied in the information (102-103, 109, Court Exs. 1, 2 at 1745-1746) indicated the theory on which it sought to implicate the defendants (101, 105, 106):

"The evidence will further show that the directing of trades by Mr. Deutsch and Duboff through Kelly Andrews and Bradley and the scurrying around by Mr. Cohen and other people for franchises, were all designed and intended to give the appearance of an exciting new company patterned along the lines of McDonald's which was making great progress and which showed a lot of activity in the market. In any case the real purpose or the real goal of all of this was to find a large investor or a number of investors eager to and willing to buy large amounts of Richard Packing's stock at high prices.

"Early in 1969 Deutsch went west in search of his target, the big investor. He went to Denver, Colorado where under one roof he found three large mutual funds. One of them, Financial Venture Fund had 45 million dollars in cash or thereabouts to invest. This Fund, Financial Venture Fund was managed by a man named Jack Hurley * * * moreover the evidence will show that Mr. Hurley bought a lot of Richard Packing's stock * * * because Mr. Cohen, Mr. Deutsch, the evidence will show gave Mr. Hurley and his fund, Financial Venture Fund as well as the other two Funds that I have mentioned in Denver a lot of false and misleading information about Richard Packing's stock and the company * * *.

"Once the Funds woke up to the true facts about what Richard Packing was, the evidence will show, the bubble soon burst and shortly thereafter the three mutual funds out in Denver, Colorado sold their shares, as I said before, they got mostly $1.00 or so on those shares and they wound up losing 5 million. Let's look at Mr. Cohen and see what happened to him. You will hear testimony that he participated in the misrepresentation in connection

with the public offering in March 1969 and you will hear about a lot of other misrepresentations that he participated in throughout the entire period. You will see that Mr. Cohen also fared very well because he was able to take quite a number of shares of his stock in Richard Packing stock that he owned and sell his shares at very high prices indeed."

The government's proof, which was strongly objected to on the ground that it had nowhere been charged in the information (262-288) principally concerned secret deals of Deutsch and Duboff with which Cohen admittedly had nothing to do and which led to numerous motions on his behalf for a severance.

Shwidock's testimony which led to one of Cohen's motions for a mistrial or a severance (322-324, 325), dealt with a secret arrangement he had with Deutsch and Duboff beginning in September, 1968 for payments to them in the form of cash kickbacks of 30% of the Kelly, Andrews profits on trades made for them as directed in stocks they were trading, including Richard Packing (333-337). The kickbacks were made through payments of some $90,000.00 to the Reiss Bank in Switzerland, of which $15,000 was attributable to the profits in trading of Richard Packing stock (349, 360). The payments to the Reiss Bank were on invoices for purported investment services (344-346) which were of no use to Kelly, Andrews (349) but represented a good way for them to pull the necessary cash out of the business in a legitimate seeming way (345).

In June, 1969 Deutsch and Duboff proposed a change in their deal with Shwidock which provoked another vain motion by Cohen for a severance or a mistrial (387-389). Shwidock testified that Deutsch and Duboff were doing so much business that they wanted an interest in an over-the-counter house which they could not properly have as registered representatives. Accordingly, they wanted to buy out Shwidock's partner and revamp the stock ownership so that their nominee would have a 90% interest with 10% for

Shwidock. They told Shwidock that if this was not done, they would open up their own brokerage house (389-390). Shwidock's refusal of the proposition (391) led to the formation of New Dimension Securities Inc. which, as will be seen, Deutsch and Duboff secretly controlled (393-394).

After breaking with Shwidock, Deutsch and Duboff commenced directing trades in Richard Packing through Mazzeo of V.F. Naddeo & Co. on fund purchase orders through Jaffee & Co. (983-988, GX 50 at 1889). This continued until October 1969 when Duboff quarreled with Mazzeo because Mazzeo was not maintaining the market that Duboff wanted him to maintain in the stock (989). Thereafter in November and December 1969 until New Dimensions came on the scene, Jaffee & Co. handled the fund purchases through Allessandrini & Co. (1200). Since Allessandrini bought the stock it supplied to Jaffee from Naddeo, the price to the funds was increased by the profits Allessandrini made on the transactions (1196-1197, GX 50 at 1889).

In December 1969 New Dimensions commenced operating (1061) and from December 1969 through April 1970 most of the fund purchases were made from that company (GX 50 at 1889). Deutsch and Duboff directed the trades in Richard Packing stock (1073-1074). The company made $115,000 in profits in trading Richard Packing stock from December 1969 to July 1970 and the proof showed that substantial amounts were siphoned off by Deutsch and Duboff, who had no ostensible connection with New Dimensions (cf. 1087-1088). In the course of this proof and in connection with checks aggregating $25,000 for renovating work done on a townhouse owned by Deutsch and Duboff (1106-1107, 1111), and in connection with a $350,000 decorating bill for the townhouse, Cohen again vainly moved for a severance (1113-1114, 1220). Other proof went so far as to show that New Dimensions paid some $6500 to a decorator for Duboff's child's bedroom furniture (1115B-1116).

Cohen had nothing to do with the sales to the Denver Funds which had come about as a result of a talk Deutsch had in the summer of 1968 with Deane, a broker at Wood Walker & Co., who handled institutiional accounts (234-235), and who put Deutsch in touch with Hurley of the Denver Funds.

Hurley testified about meeting Deutsch at Deane's suggestion in Denver in December 1968 or January 1969. At that time Deutsch talked about Richard Packing and predicted earnings of 40 cents a share by June 1969, earnings at a $3.00 rate in the following year and in the year after that at a rate somewhere between $5 to $7 a share. Deutsch explained that the company was a fast food company, that it would build dune buggies, that its main earnings would come from Circus Wagon restaurants and that the franchisees would build 60 restaurants by 1970 (608-610, GX 33 at 1882).

Thereafter in late February or early March, Deutsch spoke to Hurley and told him Richard Packing would have a stock offering and that the funds could receive some shares on the offering. He said that the offering would be below the present market of "$32 a share, or something", that the fund would do very well with it and that the stock should go up thereafter. Hurley thereupon bought 5000 shares at $28 on the offering for the fund; the price of Richard Packing went up after the offering and Hurley continued buying the stock (616, GX 50 at 1889).

In April 1969 in Las Vegas, Hurley and other fund people met Deutsch and Duboff and the top men in several companies including Cohen. Cohen in conversation with Hurley described the circus wagon concept and as a result, in late April or early May, Hurley told Deutsch that he was very impressed with Cohen and with the prospects for Richard Packing and that the fund would be interested in seeing all the Richard Packing stock Deutsch could show him (619, 621). There was no claim that Cohen misrepresented anytying at this meeting or at a later

meeting with Giasafakis whom Hurley sent to St. Paul to check on the company.

Just as Deutsch had used Cohen and Malmon as patsys in the March 11, 1969 offering, he used them as patsys in two stock splits he engineered for Richard Packing. While he was telling Hurley in May, 1969, that a stock split would generate trading activity (622-623) he was telling Cohen that it would be in the best interests of stockholders for more stock to be outstanding in the float (Cohen Ex. H at 2128) which was exactly contrary to fact because with more stock out, the price would be depressed (728).

In May or June 1969 Deutsch had sent Hurley a favorable report on Richard Packing which had been prepared by Papworth of Loomis Sayles & Co. (Deutsch Ex. A at 2191) which was not intended for distribution (770, 781).

In July 1969 Deutsch told Hurley that Richard Packing had sold 100 franchises — "roughly a hundred" and 100 more were ready to be sold, near to closing, and at about the same time Deutsch was telling Giasafakis, a Hurley associate, that over 200 franchises had been sold (626, 844-845).*

Thereafter Deutsch had several conversations on a daily basis with Hurley about Richard Packing and other stocks and once a week Hurley and the other two fund managers, Anton and Frankenthaler of Financial Dynamics Fund and Financial Industrial Fund would have an informal meeting and Hurley would discuss with the others what Deutsch had told him about Richard Packing (859).

With the funds buying Richard Packing starting in March 1969, the chart reflecting their purchases (GX 50 at 1889), shows that the price of Richard Packing rose gradually from 28-1/2 to a high of 53-1/2 in May 1969. The

*These, as will be seen, were gross misrepresentations by Deutsch with which Cohen had nothing to do.

rise in the price of the shares of Richard Packing came about because of the heavy buying by the Funds which ultimately resulted in their accumulating 75% of the outstanding floating supply of Richard Packing stock (763-764). It will be recalled that Hurley had told Deutsch that the Funds would be interested in all the Richard Packing stock that became available (619, 621) and Deutsch himself had explained to a shareholder that he knew where every share of Richard Packing stock was and that every time the price dipped or stock became available he could sell it to the Denver Funds (1245-1246). Hurley admitted that as the Funds bought the price of the stock rose (758) and Giasafakis of the Funds testified that the Denver Funds people knew at all times what the float was in Richard Packing and that it was common knowledge at the Funds that the Funds were controlling the float (864, 866-867). In light of the foregoing, the price of Richard Packing stock was going up against the market trend (812-813).

However, after the high water mark of 53-1/2 in May, 1969, by which time, according to GX 50 (at 1889) the Funds had bought 35,000 shares, the price declined despite the continued buying by the Funds of some 100,000 additional shares.* In December 1969 the price ranged in the low 40's and it continued in that range through February 1970. In April 1970 when the last purchases of some 3,000 shares were made the price had declined to the 20's. The decline in the price was attributable to the change in accounting principles applicable to the franchise industry which became effective in the Fall of 1969 (1160) which required that income from the sale of franchises be treated as deferred rather than as current income (888-889, 1167; cf. Cohen Ex. W at 2132).

Hurley talked to Deutsch in late February or March 1970 at which time Hurley asked why the company was not doing as well as it was supposed to be doing, was the money

*The funds ended up with 156,000 shares because of the two 25% stock dividends.

there to build the restaurants and why the company had not sold as many franchises as had been projected. Deutsch told him not to worry whereupon Hurley told him he felt like selling all the Richard Packing stock. Deutsch said couldn't he get out first, with which Hurley walked away (631-635). Nevertheless, Hurley's own fund subsequently bought 3000 additional shares of Richard Packing in April 1970 as shown in GX 50 at 1892.

There was no evidence adduced as to what led the funds to dump their shares as they did in July and August 1970. Hurley had left Financial Programs in June 1970 to go with New Dimensions (675) without having seen a financial report of Richard Packing (631) and the last purchases by the Funds had taken place on April 22, 1970 at $26 per share.

Then out of the blue and without any indication as to the state of the market as far as the evidence was concerned the Funds dumped their huge holdings. Over strenuous objection (1202 et seq.) (Point VII) evidence was admitted that on July 27 and 28, 1970 the Funds sold 78,000 of Richard Packing in lots of 60,000, 6,000 and 12,000 at one dollar per share and on August 26, 1970 the Funds sold the 78,000 share balance of their holdings in lots of 61,000 and 17,000, again for $1.00 per share (GX 63 a-e).

There is nothing in the 1969 Annual Report (GX 13 at 1782) to justify the inference which the government sought to draw: that on receipt of the report showing the "true" facts as to Richard Packing the Funds decided to dump their holdings. The balance sheet showed a net worth of over 2 million dollars for the company and there was no claim that Cohen's optimistic letter to stockholders (GX 13a, pp. 4-5 at 1785-1786) contained any untrue statements. A fairer inference than the government sought to draw is that the Funds had soured on the franchise industry whose earnings were so drastically affected by the accounting requirement that income from the sale of franchises be treated as deferred rather than current. As O'Meara ex-

plained, this particularly affected beginning companies like Richard Packing (888-889).

While all these activities of Deutsch and Duboff were going on unknown to Cohen, the evidence shows that Cohen, who was described by Malmon as one of the hardest working men he had ever known and one whose reputation was beyond reproach for business ability and integrity (146-147, 222-223); and who was described by O'Meara, a government witness and the Value Line analyst who recommended the Richard Packing investment (GX 2 at 1747), as a high-class gentleman and a hard worker who knew his subject (882), was heavily engaged in the operations of Richard Packing. He was receiving reports in 1968 and 1969 from Faris in charge of sales of Circus Wagon franchises for Status Marketing on the progress in selling franchises (1273-1274). He hired Kally, a McDonald executive, who came to work for the company in September 1969 bringing with him other McDonald personnel, to find locations for the franchises and supervise the construction of the Circus Wagon restaurants (900) and during 1969 and 1970 was in daily contact with Kally about the company's affairs and the problems with franchisees (936).

Richard Packing opened several restaurants and broke ground for others in the same period (937, Cohen Ex. FF at 2158). Cohen kept on asking the company's accountants Lybrand, Ross Bros. & Montgomery when they would be finished with the 1969 Annual Report for the company (1362-1363). He negotiated a commitment with Surnow for 20 million dollars for the development of the franchised restaurants (1336-1337) and when the funds failed to come through (1339) he used his own funds and his personal credit to the extent of some $600,000 to keep Richard Packing viable (1323-1325), thus more than offsetting the profits he had made by selling his insider shares from time to time with approval of his counsel under the dribble theory (227-231, GX 48 at 1888). He invariably

asked company counsel, Malmon, for assurance that the steps the company was taking were legal (150).

Despite the foregoing Cohen was principally accused by the Government of misstating the number of franchises sold in an April 6, 1970 press release (GX 31g at 1881), of delaying the issuance to stockholders of the Annual Report for fiscal 1969, of a connection with New Dimensions, of having profited to a substantial extent from the rise in Richard Packing stock by selling his insider shares from time to time under the dribble theory and of having falsely stated that he had a 20 million dollar commitment for development of the restaurants under the franchise program.

The defense countered these claims as appears in the argument that follows, but the real harm to Cohen came from evidence as to secret deals of Deutsch and Duboff with which Cohen admittedly had nothing to do.

Cohen, it will be shown, was convicted in this case on the basis of a thoroughly unfair trial in the course of which the machinations of Deutsch and Duboff and the greed of the Denver Funds with which he had nothing to do, rubbed off on him.

F. Summary of Argument

While it is contended that the evidence against Cohen was insufficient (Point IV), the heart of the argument is that Cohen did not receive a fair trial because he was convicted on charges other than those laid in the information (Point I).

It is next contended that there was a fatal variance as to Cohen because multiple conspiracies were proved (Point II) and the admission of evidence of his co-defendants' conduct with which he was not connected required a rance as to him (Point III). As a corollary of this, it is ged in Point IV, the insufficiency point, that the spill-

*This contention as well as others made herein were vainly urged when the post-verdict motions were argued (1705-1724).

over from the irrelevant and grossly prejudicial evidence admitted under counts 1-3 led to Cohen's conviction on count 4 dealing with the offering circular.

The remaining points deal with items of erroneously admitted evidence, with the prosecutor's summation and the court's rulings on requests and its charge.

POINT I

REVERSAL IS REQUIRED BECAUSE COHEN WAS CONVICTED ON A CHARGE NOT LAID IN THE INFORMATION.

The crucial question in this case which should be dealt with at the outset involves the thrust of the charges. It is contended that the conspiracy count, on the basis of which all of the prejudicial irrelevant evidence as to uncharged acts came in (cf. 262 et seq.), centered on the allegedly false offering of March 11, 1969. Instead the Court mistakenly construed it as charging a plot to defraud the Denver Funds (1585, 1607).

This case is like *United States v. Zeehandelaar*, 498 F.2d 352 (2 Cir. 1974) where reversal was had because it was not clear that the defendant was convicted on the charge laid against him.*

This Court said the following in *Zeehandelaar*, pertinent here, regarding the function of an indictment (498 F.2d 356, fn. 1):

> "An indictment drawn with reasonable certainty assures that the defendant will not be tried or convicted for an offense other than the one for which he was indicted by the grand jury, that the defendant will be able to prepare an adequate defense and to address himself to the relevant

*The decision in *Zeehandelaar* where the case had also been tried before Judge Ward came down on May 15, 1974 after the damage had been done in the trial in the case at bar which had started on April 23, 1974.

questions of fact and law, that the trial court will be able to determine that the jury's verdict rests on substantial evidence, that an appellate court's affirmance will not be for a crime other than the one for which defendant was convicted, and that the defendant will not face the prospect of being placed twice in jeopardy. See generally Russell v. United States 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962)."

The information at bar on any fair construction did not charge a plot to defraud the Denver Funds. Rather the charging parts of the basic count, Count 1, centered on the March 11, 1969 offering circular. The fundamental error which permeated the trial was that the trial judge treated the means paragraphs in the information as if they were charging paragraphs, whereas most of those paragraphs had nothing to do with any possible conspiracy involving Cohen. His action in permitting unalleged allegedly false representations and undefined manipulative devices to come in, is precisely what the Court in *Stirone v. United States*, 361 U.S. 212 (1960) said could not be done. See also: *United States v. DeSapio*, 299 F. Supp. 436, 445-6 (D.C. N.Y. 1969) where Judge Metzner struck allegations of a mail fraud scheme from the indictment for failure to set forth details of the alleged scheme. His action prevented the precise situation which occurred in the case at bar, namely the proving of unalleged charges.

If there was a scheme to defraud the Denver Funds it is clear from the foregoing that it should have been charged as such and the allegedly false representations and manipulative devices should have been described.*

It is clear from the Court's charge that the case was submitted to the jury on the theory that there was a con-

*After the decision in *Zeehandelaar* came down, the trial judge was slightly more conservative. At the May 16 session, the Court refused to let the government introduce proof that the proceeds of the March 11, 1969 offering had been misapplied because there was no allegation to that effect in the information (967 et seq.)

spiracy to defraud the Denver Funds. In its only reference to the purpose of the confusing conspiracy alleged in the information the court told the jury (1585) that:

> "The information charges that the defendants engaged in transactions, practices and courses of business which operated as a fraud upon the purchasers of Richard Packing Common stock. In order for you to find each of the defendants guilty of this charge, it is necessary for you to find that the facts concerning manipulation were to be concealed from these purchasers of Richard Packing common stock.
>
> "The crucial question here is not the illegality of the practice but the agreement to conceal them from the customer, in this case Financial Venture Fund, Financial Dynamics Fund and Financial Industrial Fund."

This, of course, in addition to misstating the charge, completely overlooked the evidence that the rise in the price of Richard Packing shares was a direct result of the enormous purchases of the stock by the Denver Funds.

In addition and over exception (1618) the Court gave a Pinkerton charge (1610) which in this case left it to the jury to carry over its findings on Counts 1, 2 and 3 to Count 4, which on its face involved only the offering circular.

The jury's requests for exhibits dealing with events long subsequent to the offering circular of March 11, 1969 indicates that it focused on the Denver Funds matter rather than on the offering circular (1654, 1659, 1663).

In light of the foregoing, Cohen was convicted on a charge not laid in the information and the conviction in consequence cannot stand.

POINT II

THERE WAS A FATAL VARIANCE AS TO COHEN IN THE PROOF OF MULTIPLE CONSPIRACIES.

As noted in Point I, the Court accepted the prosecution theory that there was one conspiracy charged, that is a conspiracy to defraud the Denver Funds by false representations and manipulation of the price of Richard Packing stock.

This was a mistaken view, however, because the conspiracy charged centered on the March 11, 1969 offering circular. There was no connection between the offering of March 11, 1969 and the Funds, at least as far as Cohen is concerned. Indeed, neither Deutsch nor Cohen had even heard of Hurley in October, 1968 when the 10,000 share offering was decided upon. The 5,000 shares of the offering which Hurley bought had nothing to do with the alleged falsity in the offering circular. Hurley bought the shares on the basis of a suggestion by Deutsch which had nothing to do with whether or not there was an underwriter, etc. (616).

In any event the Court's mistaken view of the case led to a fatal variance in the proof. This case like *Kotteakos v. United States*, 328 U.S. 250 (1946), involved a spoke-like series of conspiracies with Deutsch and Duboff at the center.

Thus, over and above the charges in the information Deutsch and Duboff were engaged in the following conspiracies: a conspiracy with Shwidock, Kelly Andrews and Reiss involving the directing of trades in Richard Packing and the funneling of kickbacks to Deutsch and Duboff; a conspiracy with Mazzeo, V.F. Naddeo and with Weiss and Allessandrini & Co. involving the directing of trades in Richard Packing; a conspiracy with Ryback and Rothman of New Dimensions involving the directing of trades in Richard Packing and the siphoning off of New Dimensions

profits for their own personal use; a conspiracy with Hurley in connection with the Funds' purchases of Richard Packing and Hurley's later affiliation with New Dimensions — in all of which Cohen was not involved.

The variance here involved compelled a dismissal of the charges on the authority of *Kotteakos, supra,* as construed by this Court. Thus in *United States v. Calabro,* 467 F.2d 973 (2 Cir. 1973), cert. den. 410 U.S. 926, which dealt with a "chain" conspiracy rather than the "spoke" conspiracy here involved, the test for reversible error where more than one conspiracy was proved was described as follows (p. 983):

> "Moreover, even if one concluded that two conspiracies were shown, one to forge postal money orders in the fall of 1967 and one of longer duration turning on savings bonds, John would not benefit thereby. '[T]he test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed.R.Crim.P. 52(a).' United States v. Agueci, 310 F.2d 817, 827 (2d Cir. 1962), cert. denied, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed.2d 11 (1963); United States v. Vega, 458 F.2d 1234 (2d Cir. 1972). The requirements for sustaining a verdict in which there has been a variance have been met when there is no double jeopardy problem and no issue of unfair surprise deriving from the proof of two conspiracies rather than one (Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), and when '[t]he several conspiracies, if there had been such, could have been joined in a single trial and the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal.' United States v. Agueci, *supra,* 310 F.2d at 827."

Nor, as this Court went on to say, in language particularly pertinent here, was the protesting defendant in *Calabro*, a peripheral defendant like Schuck in *United States v. Kelly*, 349 F.2d 720 (2 Cir. 1965), cert. den. 384 U.S. 947 "whose connection to the overall conspiracy was so tenuous and different in quality from that of the main defendants that excessive care was necessary to avoid irreparable prejudice to him deriving merely from presence on trial with them."

The case at bar meets the tests for reversible error set forth above. As shown in Point IV, *infra*, Cohen was a peripheral defendant in the case. There was obviously a double jeopardy problem here where the bulk of the proof involved charges not laid in the information. And the repeated requests for a mistrial, objections to evidence and motions to strike showed unfair surprise.

The all-or-nothing charge which the court gave (1575) over objection provided the clincher as far as reversible error was concerned. The charge removed the issue of multiple conspiracies from the jury despite Cohen's argument in summation (1451-1452), because the jury understandably would have been loathe to acquit the core figures, Deutsch and Duboff. The charge in this respect and under the circumstances of this case was as grossly in error as was the same charge in *Kelly, supra*.

POINT III

THE CASE AGAINST COHEN WAS PREJUDICED BY THE EVIDENCE OF HIS CO-DEFENDANTS' CONDUCT. ACCORDINGLY A SEVERANCE SHOULD HAVE BEEN GRANTED.

The mistaken view of the case by the court described above, led it erroneously to deny Cohen's motions for a severance which were repeated as evidence of conspiracies

among Deutsch and Duboff with which Cohen was not even remotely connected, came in.

This case most closely resembles *United States v. Kelly, supra*, where reversal as to Schuck was had because of the failure of the trial judge to grant him a severance. This Court held that the severance should have been granted because of the proof which came into the case of illegal activities of Schuck's co-defendants with which he had nothing to do.

The trial judge in the case at bar recognized that a severance was proper any time in the course of a trial when prejudice to a defendant appeared from evidence not connected with him (190, 191) but mistakenly refused to grant the requested relief.

Thus, Cohen's motion for a severance was denied when the highly prejudicial testimony of Shwidock as to his secret kickback deal with Deutsch and Duboff with which Cohen admittedly had nothing to do (323), was about to be adduced (322-324, 325). It was again denied when Shwidock's testimony disclosed that Deutsch and Duboff were guilty of tax evasion in connection with their secret kickbacks (395-396).

Cohen also moved for a severance in connection with the extremely damaging testimony of Rothman about the siphoning off by Deutsch and Duboff of monies from New Dimensions for their personal use (1099, 1113-1114). While the court acknowledged that the case might be getting to a point where the motion would lie, it nevertheless refused to grant it because of the evidence in the case that Cohen had opened a $200,000 trading account for Richard Packing with New Dimensions at its inception in December 1969 (1079). This, despite the admitted proof that no trades were ever made in the account and the money was returned (1080) and the further proof that New Dimensions was not only not benefitted by the funds (1122) but to the contrary, its net capital ratio was reduced (1128-1129). It is submitted that the slight connection between

Cohen and New Dimensions based on the abortive trading account in no way justified the evidence, which must inevitably have tarred Cohen, of Deutsch and Duboff's secret dealings with the principals in New Dimensions.

Cohen's final motions for a severance were made in connection with the testimony of Austin, an interior decorator who was to testify about a major decorating job he did ostensibly for New Dimensions, but actually for a townhouse which was owned by Deutsch and Duboff (1220-122!). The motion was vainly renewed after Austin had testified to doing a 300 to 350 thousand dollar job on the townhouse and to billing New Dimensions for the work at the direction of Deutsch and Duboff (1236, 1242).

All of the foregoing had nothing to do with the charge laid in the information, as urged in Point I, *supra*. But even if the trial judge was correct in his view that the charge involved a plot to defraud the Denver Funds, the harm done to Cohen by this evidence was incalculable. Even if the trial judge had endeavored to charge the jury so as to erect an "impregnable" barrier against the use of the evidence of the co-defendants' machinations to the prejudice of Cohen (*Kelly*, *supra*, p. 758) — which he did not — the impact of that evidence was so devastating as to have made such instructions valueless. As Judge Medina wrote in *Kelly*, (349 F.2d 759):

> "The principal and inevitable prejudice, however, was caused by the slow but inexcusable accumulation of evidence of fraudulent practices by Schuck's co-defendants Kelly and Hagen. * * * That some of this rubbed off on Schuck we cannot doubt."

The failure of the trial judge in the case at bar to have granted Cohen a severance, alone is ground for reversal.

POINT IV

THE EVIDENCE AS TO COHEN WAS INSUFFICIENT.

If the conspiracy count and Count 2 are deemed to involve the sale of 10,000 shares of Richard Packing stock through the issuance of a false offering circular, then surely the evidence was insufficient as far as Cohen was concerned. He, as the prosecutor admitted (323), knew nothing of the secret arrangements Deutsch and Duboff had made with Shwidock in September, 1968 to trade Richard Packing stock as directed.

Moreover and most important, he was not shown to have had any knowledge of the arrangements Deutsch and Duboff had made in connection with marketing the offering. (cf. p. 1522, where the prosecutor in summation referred to Deutsch and Duboff's arrangement for a $28 per share price). Nor was there any showing that Cohen knew anything about the distribution Kelly, Andrews made of the offering.* All Cohen knew as appears from his letter of March 5, 1969 to Shwidock (Cohen Ex. F at 2127) was that Shwidock would be handling the sale and that his company had an assurance that it would receive at least $28 per share which was a good assurance for a substantial secondary in the unpredictable over-the-counter market as Malmon stated (216-219). If the transfer of 10,000 shares to Kelly, Andrews did not alert Malmon to make inquiry as it did not (212) it is far fetched in the extreme to infer any knowledge on Cohen's part. It is a safe assumption that all he was really interested in was obtaining as he did the promised proceeds for his company.

On the other hand, if the counts in question are

*The prosecutor's argument in summation (1524-1525) that Cohen had never told Malmon that Deutsch and Duboff were directing the distribution and that Morganstin and Harris were receiving some of the shares was fantasy because there was no evidence that Cohen knew about these matters.

deemed to charge a plot to defraud the Denver Funds, Cohen's participation in any such plot did not meet the test of *United States v. Dennis*, 183 F.2d 201 (2 Cir. 1950). When he told Papworth that his report on the company (Deutsch Ex. A at 2191) was good, this cannot be construed to mean that he adopted its contents in their entirety. It was Deutsch and not Cohen who saw to it that Hurley received the report. And furthermore there was substantial evidence that the alleged false statement in the Papworth report about the acquisition of F & T Meats had a basis in fact in that an agreement had been reached for the acquisition, which agreement blew up only at a later date (1316, 1319). Moreover, the earnings projections which Cohen approved were reasonable (295-297). They could conceivably have been realized except for the change applicable to accountants for the franchise industry which required them to treat income from the sale of franchises as deferred rather than current, which is discussed below and which drastically affected the company's earnings (1146-1151). Deferred income for fiscal 1970 from the sale of franchises alone according to the company's records which the accountant accepted (GX 13b-1 at 1797) amounted to $387,500.

The case against Cohen rests essentially on the press release of April 6, 1970 which stated that 210 franchises had been sold,* which statement contrasts with Cohen's statement in his April 16, 1970 letter to stockholders in the 1969 Annual Report (GX 13a at 1786) that 82 franchises had been sold and which contrasts as well with the accountant's findings as to the number of franchises sold as of June 30, 1970 (1144); on his alleged delaying of the 1969 Annual Report; on his profits under the dribble theory and on his allegedly false statements about the 20 million dollar commitment from Jack Surnow (906). There is no claim

*There was no claim that the other press releases were false except for the extraordinary statement made about them in the prosecutor's summation which is discussed *infra*, p. 44.

that he made any false oral statements to any of the Denver Funds people.

With respect to the alleged discrepancies in the number of franchises sold, it was undisputed that this was accounted for by a change in accounting principles applicable to the franchise industry.

Brodcorb, a government witness and a C.P.A., testified that there was a change in accounting principles applicable to the franchise industry which became effective as far as accountants were concerned in the fall of 1969 (1160). While accountants were permitted to count as franchises sold only units which had been fully paid for, thus accounting for the 27 which he found (1144), the practice in the industry which had been previously approved by accountants was to count all units which a franchisee had undertaken to construct whether contigently or not (1165-1166).

The evidence showed, however, that Kally, a government witness and the man at Richard Packing handling franchises and Faris, a defense witness and the national sales manager of Status Marketing, engaged in selling Richard Packing franchises, agreed on counting franchises in the liberal way described by Brodcorb which had flourished until the change which was applicable to accountants but not to businessmen (935, 1165-1166, Cohen Ex. AA at 2154; 1278; 1164).

Thus, Faris testified that as of March 1969 more than 200 franchises had been sold (1290-1292) and that approximately three franchises had been cancelled as of that time (1275). His method of counting franchises can best be illustrated by an example. Where a franchise licensing agreement was entered into for two restaurants with the right accorded to the franchisee to build more restaurants in the future up to a certain amount, let us say 20, Faris treated 20 as the number of franchises sold, because no more franchises could be sold in the area. He went on to say that he regarded areas as his inventory for sales (1278). He

testified that he had been in the business of selling franchises and that his practice with other companies had been to count franchises in the same way (1314). He reported to Cohen on the basis described above (1282, 1291-1292).

Kally counted franchises in the same way. Cohen Ex. AA (at 2154) which was prepared by the witness listed 97 franchises sold as of April 1, 1970 and was incomplete (935).

Accordingly, while Cohen was stating the number of franchises at 210 in the press release using the industry method of counting, he used the lower figure of 82 in his letter to stockholders in the 1969 Annual Report (GX 13a at 1786) presumably because of the stricter method of counting dictated by the change in accounting principles. Brodcorb's figure of 27 (1144) reflected an even stricter application of the new accounting principles.

In any event, the April 6, 1970 press release with the 210 figure as to franchises sold, had nothing to do with the charges in the information (cf. 1142-1143) and certainly had no impact on the Fund purchases. GX 50 at 1892 shows that by February 1970 the Funds had acquired 126,000 shares of Richard Packing with the last purchase in February being made at a price of $46 per share. After the April 6, 1970 press release the Funds bought 2,500 shares on April 1st and 16th at $29.50 per share and 500 shares on April 22 at $25-26 per share.

The notion that Cohen delayed the issuance of the 1969 Annual Report was laid to rest by Louder of Lybrand, Ross Bros. and Montgomery, the accountants for Richard Packing. Louder testified that Cohen was continually pressing for the issuance of the report (1362-1363) and he explained that issuance of the report had been delayed because of accounting problems (1349-1350, 1351-1352). The report was not completed as evidenced by the accountants' certificate on the last page of GX 13a (at 1792) until March 20, 1970.

Following the completion of the work by the ac-

countants, the issuance of the report was further delayed by Bass & Company, a financial public relations firm which had been retained by Cohen and which was responsible for the preparation of Cohen's letter to stockholders which accompanied the report and which is found at pp. 4 and 5 of GX 13a (at 1785-1786) and which is dated April 16, 1970 (1181-1182).

Thereafter, according to Mrs. Segal, a Richard Packing employee, the 1969 report was sent out in the spring of 1970 to Richard Packing stockholders and other interested persons as soon as it was received at the company offices (1265-1267).*

Mrs. Segal's testimony tied in to a letter which Cohen had written to Bass & Company on March 19, 1970, which read as follows (GX 84 at 2019):

> "Lybrand, Ross Bros. & Montgomery will be mailing you a copy of the financial statement, which you in turn will incorporate in your total year end statement package.
>
> "I want the finished year end statement to be mailed to Richard Packing Company, 790 So. Cleveland at the cheapest rate of mailing.
>
> "We will distribute them to stockholders from this office.
>
> "I DO NOT wish this statement to be distributed to any media whatsoever. Only our stockholders are receiving this report and we will do that distributing. Please make sure these instructions are followed to the letter. Please call me if you have any further suggestions."

As noted above, the report was mailed out as soon as received and there was no evidence that its contents led the Funds to dump their holdings.

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*There was considerable confusion about the date of issuance of the Annual Report. Deane, a stockholder testifying for the government, said he received it in April 1970 (261). Copies of it had been distributed to franchisees of Richard Packing at a meeting in May 1970 (927-929) and Clayton, another stockholder, received it with a July 21, 1970 postmark (1444).

The only other alleged participation by Cohen in the supposed conspiracy was his profiting by his sales from time to time of his insider stock under the dribble rule, the legality of which was not questioned (965-966). The chart showing that he profited by such sales to the extent of some $450,000 (GX 48 at 1888) was vigorously objected to (954-960) and the objection is pressed here (Point V). In the absence, as here, of any showing that Cohen had anything to do with the alleged manipulations by Deutsch and Duboff, and the rise in the price of Richard Packing stock which resulted from the huge Fund purchases, the chart should not have been admitted. In any event, the view that his sales had nothing to do with any conspiracy is confirmed by the fact that starting in 1971 and continuing for several years he used his own funds and credit amounting to $600,000 to keep his company viable and took no salary (1324-1325a).

In light of the foregoing it is submitted that the evidence against Cohen, even on a theory that the conspiracy involved a plot to defraud the Denver Funds, was insufficient.

The convictions on Counts 3 and 4 cannot stand any more than those on 1 and 2.

Count 3 involved a sale of Richard Packing stock to the Denver Funds in November 1969 long after the March 11, 1969 offering. This was not only irrelevant but there was no evidence linking Cohen to that sale. However, the court's Pinkerton charge erroneously allowed the jury to convict Cohen if it found that he was involved in the uncharged conspiracy to defraud the Denver Funds.

As far as Count 4 is concerned, Cohen, as shown above, was not proved to be guilty beyond a reasonable doubt of issuing a false offering circular. *United States v. Frank*, 494 F.2d 145 (2 Cir. 1974). Moreover, the court's Pinkerton charge and the spillover from the erroneously admitted evidence on Counts 1 and 2 undoubtedly caused his conviction on Count 4. *Kelly, supra: United States v. Febre*, 425 F.2d 107 (2 Cir. 1972), cert. den. 400 U.S. 849.

POINT V

GX 48, THE CHART SHOWING COHEN'S INSIDER SALES, SHOULD HAVE BEEN EXCLUDED.

Malmon explained that on the basis of his opinion as company counsel, Cohen had freed up his insider shares from time to time (226) and testified that this was proper under the dribble principle of former Commission Rule 154 (229-231).

Thereafter, the government, on the theory that Cohen's profits on these sales represented his share of the profits of the supposed plot to defraud the Denver Funds (106), offered GX 48 (at 1888) a chart showing the sales by Cohen of his insider shares and the profits made therefrom. It showed that Cohen at six month periods from October 1968 to February of 1970 sold some 13,000 shares at an over-all profit of some $460,000.*

The offer was strenuously objected to on the ground that there was no proof whatsoever that Cohen, in exercising the rights accorded him under the securities law as an insider or control person, did so with intent to violate the law and that accordingly the chart was prejudicial in the extreme (954).

The court overruled the objection and admitted the document (960) and it is claimed that this is reversible error.

Apart from the fact that these transactions were nowhere alleged in the information (cf. 955) there was no evidence whatsoever connecting these sales of Cohen's with any conspiracy in connection with the offering circular or even with the supposed conspiracy to defraud the Denver Funds.

Examination of the chart shows that Cohen was selling

*Although Richard Packing stock reached a price of 53-1/2 in May 1969, the highest price Cohen ever received for his shares was $44 a share according to GX 48 (at 1888).

his shares in October and November of 1968 which was long before the offering of March 11, 1969 and long before the government even attempted to connect him with any conspiratorial activity.

The government in arguing for admissibility, pointed to the fact that the broker on the buy side of the first 2500 share transaction was Kelly Andrews & Bradley (958) but there was nothing to show that Cohen knew that Jaffee & Co., the respectable brokers he entrusted with the sale, had sold to that firm. The government also pointed to the fact that New Dimensions, which was selling to the Denver Funds, was the broker on the other side of the transactions in December 1969 and early 1970 (958) but again there was no evidence that Cohen knew who the broker was on the other side of the transaction.

The government summed up with deadly effect on the basis of the chart (1517) and the court, in charging the jury, alluded to the government's contention that Cohen, as a result of his participation in the conspiracy and his aiding and abetting, was enabled to sell his shares at substantial profits (1609) — all without any mention of this in the information and without a shred of evidence to connect these acts with any conspiracy or aiding and abetting of any manipulative activity.

POINT VI
THE COURT SHOULD HAVE EXCLUDED THE EVIDENCE ABOUT RICHARD PACKING'S ACCOUNT WITH NEW DIMENSIONS.

In its effort to tie Cohen into the allegedly manipulative activities of Deutsch and Duboff which centered on New Dimensions, the government was permitted, over strong objection, to prove that Richard Packing had opened a trading account with New Dimensions at the inception of that brokerage house in

December 1969 (1051-1054). In support of its position the government urged that Cohen was connected with New Dimensions by reason of Deutsch's statement to Hurley, not in Cohen's presence that Cohen was to have an interest in the company (663-666). It pressed that point despite the absence of any evidence showing that Cohen in fact had any interest in the company or had even discussed it with anybody.

Thereafter, Rothman of New Dimensions testified that Richard Packing had opened a customer account in the amount of $200,000 in December 1969 (1078-1079) that no trading was ever done in the account (1080) and that the $200,000 was returned in installments in April, May, June and July of 1970 (1080-1081). On cross examination, Rothman acknowledged that the Richard Packing account money adversely affected New Dimension's net capital ratio (1128-1129).

This evidence was not only damaging to Cohen because it unfairly linked him with New Dimensions, but the court mistakenly relied on this supposed connection of Cohen with New Dimensions to deny Cohen's motion for a severance when other proof of Deutsch and Duboff's machinations came in (1114).

The court adhered to its ruling on the supposed relevancy of the Richard Packing account when Cohen moved to strike Rothman's testimony on the subject. Counsel pointed out that the information was silent on the matter and further that the transaction was an innocent one which in no way furthered any conspiracy (1136-1141).

Cohen was gravely prejudiced by the admission of this grossly improper evidence.

POINT VII

THE COURT ERRED IN ADMITTING EVIDENCE OF THE FUNDS' SALES OF RICHARD PACKING STOCK.

The government met with strong objection in its attempt to adduce proof that the Denver Funds dumped their Richard Packing holdings in huge blocks in July and August 1970 at a price of $1.00 per share (1202 et seq.) but the court admitted the evidence despite the fact that it recognized that the sales were "not in furtherance of the conspiracy". It saw the supposed relevance as follows (1214):

> "The information charges basically a manipulation, an inflation of the price, accompanied by purchases by the Funds.
>
> "The stock thereafter declined and the Funds sold and a loss resulted. The government's theory as I understand it is that the loss resulted from the initial activities of the defendants in manipulating the market and in causing the Funds to buy at manipulated or inflated prices and thereafter when the stock found its true level, the Fund, in selling, sustained a substantial loss."

The court was grossly in error in its view because the government theory was nowhere alleged in the information which dealt, as has been shown, with the alleged falsity of the March 11, 1969 offering circular; because there was no evidence whatsoever linking Cohen with any manipulative activities even if the court's view was correct; because it was clear that the rise in the price of the stock was due to the huge Fund purchases and not to any manipulative activities and because there was not a shred of evidence to show why the Funds dumped their shares.

The government attempted to draw an inference that the Funds decided to sell after receiving the "true facts"

about Richard Packing in the 1969 Annual Report but the foundation for such an inference was wholly lacking in the absence of any evidence as to the reasons for the Funds' sales. The 1969 report did not show Richard Packing to be a failing company by any means. Indeed, there was substantial income from the sales of franchises, but the income had to be treated as deferred under the revised accounting rules applicable to the franchise industry. Moreover, there was no evidence that the company was losing money. Kally's testimony on the point was excluded (932). And the franchisees were well satisfied with the progress of the company as late as May 1970 (927-929, Cohen Ex. EE at 2155).

Further, there was no evidence as to what the market for Richard Packing was in July and August 1970. The last indication as to the market in GX 50 (at 1892) shows that the stock was selling at about $25 per share in April 1970. There can be no inference, the court to the contrary notwithstanding, that the market was $1.00 per share when the Funds sold out because obviously the market for any stock would crack wide open when 75% of the floating supply is dumped as was the case here.

The gravity of the court's error in admitting this evidence which wholly lacked foundation and relevance to Cohen is highlighted by counsel's refusal of the court's offer to give limiting instructions. Counsel stated (1213):

> "If your Honor please, I think all counsel agree with me that the admission of these records (of the Funds's sales in July and August 1970) are so devastating to the defendants that no limiting instructions will help and we, therefore, do not request any limiting instructions". (Matter in parentheses supplied).

The harm to Cohen from the erroneous admission of this evidence on the wholly untenable theory that Cohen was engaged in manipulation of the price of Richard Packing shares justifies awarding him a new trial.

POINT VIII

THE COURT ERRONEOUSLY EXCLUDED PROOF OF DEFENSE EFFORTS TO SECURE THE ATTENDANCE OF SURNOW, A MATERIAL WITNESS.

The government adduced testimony from Kally that Cohen had told him that Richard Packing had a commitment from one Jack Surnow for 20 million dollars from a European source for the development of the Circus Wagon restaurants under the franchise program (906) to support an inference, of course, that this was a misrepresentation by Cohen because no such funds ever came into Richard Packing.

The defense sought to adduce testimony before the jury of its efforts to obtain Surnow's attendance at the trial but was precluded from doing so by the court (1429-1439).* This was error, *United States v. Malizia*, —F.2d—, (2 Cir. Docket No. 74-1389, 9/17/74) and the error was crucial in this case.

Deutsch, according to Hurley, had talked about Richard Packing obtaining 15 to 20 million from a union pension fund (627), so Cohen's talk about 20 million from a European source which never came through tied him into the other exaggerations and manipulations of the co-defendant, unless Surnow could have been produced to corroborate what Cohen had said.

It is true that through Dudowitz, a defense witness, Cohen was able to show that he had received a letter from Surnow about the commitment, which had been lost at the time of the trial. However, the witness was almost completely vague about the letter (1334-1340) and as the

*Cohen's co-defense counsel, Orenstein, testified outside the jury's presence that a subpoena which was issued timely under the circumstances was not served because of the failure of the United States Marshal in Detroit to take appropriate action (1435-1436, Cohen Ex. SS at 2159).

prosecutor remarked during the testimony, in the presence of the jury, the best evidence as to the commmtment would have been Surnow (1332).

After the court had excluded the proposed proof of the defense efforts to obtain Surnow's attendance, it indicated it would give the missing witness charge (1437) and it did so (1611) over counsel's objection (1447).

The missing witness charge constituted a double injury for Cohen was not only unable to show his efforts to adduce Surnow's testimony, but the charge took all the sting out of his counsel's claim on summation that the government had failed to call Surnow in support of its contention that there had never been any 20 million dollar commitment (1454).

Surnow was a highly material witness for the defense and the court's ruling was gravely prejudicial to Cohen.

POINT IX

THE PROSECUTOR'S SUMMATION WAS GROSSLY UNFAIR AND THE COURT TOOK NO ACTION ALTHOUGH REQUESTED TO DO SO.

In derogation of the warning in *United States v. Persico*, 305 F.2d 534 (2 Cir. 1962) the prosecutor constituted himself a witness in the case by distorting the evidence and stating as facts matters not found in the evidence. And the court, despite the fact that these abuses were called to its attention during the summation and after it in connection with motions for a mistrial (1517, 1538-1539) and in supplemental requests to charge, hereinafter described, merely told the jury that its recollection governed. It should at least have instructed the jury to disregard the offending statements. *United States v. Schwartz*, 335 F. 2nd 355 (3 Cir. 1964).

Most prejudicial as to Cohen was the prosecutor's

statement without a shred of evidence to support it that the substantial money Cohen had plowed into Richard Packing after 1971 had been inherited by him from his father (151).* This undermined completely the thrust of the defense which was to show that Cohen had not benefitted from the profits he had made on his sales of stock under the dribble rule because he had put that money and more back into the company. When objection was made to this outrageous statement, the court merely said that the jury's recollection would govern (1517) and subsequently refused (1618) to charge Cohen's Supplemental Request No. 9 (at 1729) to the effect that there was no evidence in this case that Cohen inherited any money.

Furthermore, although the court had exacted a promise from the prosecution that it would make no allusion on summation to the discrepancy in the description of the capabilities of dune buggies without first taking the matter up with the court (318-321), the prosecutor ignored the injunction and argued that the discrepancy was an indication of the complete irresponsibility of the defendants in making statements about Richard Packing (1472-1473).* Indeed, the jury could well have found that Cohen was guilty on the basis of that discrepancy alone because the court charged that the jury could convict on *any* false representation (1561).

The prosecutor told the jury in ridiculing Cohen's statements about the number of franchises sold that "from the first press release to the last one, they had 210 franchises" (1461). This was grossly untrue as a reading of the press releases shows (GX 31a-e, g at 1876-1881).

However, the prosecutor's most glaring distortion of

*The prosecutor only established from Dudowitz, a defense witness, that Cohen's father had died. The witness knew nothing about his estate (1326-1327).

*In the Papworth report (Deutsch Ex. A at 2195) the dune buggies were said to be only for use on roads. In a press release (GX 31c at 1878) dune buggies were described as being capable of operating anywhere including sandy beaches.

the press releases involved the following statements which had the unfair effect of linking Cohen to Deutsch's gross misrepresentations in the absence of any evidence to that effect.

The prosecutor said (1467):

> "Take the press releases in, ladies and gentlemen, 31b says he had 19, 31c 19 more (whereas 31c merely repeated the 19 figure in 31b) 31d, 23 additional (instead of 4 in addition to the original 19), 31e, 41 additional (instead of 22 more than the original 19). Add those up and you get 102, 102 in October 1969.
>
> "So you've got Mr. Deutsch with 200 in July, Mr. Cohen with 102 in October 1969 and then Mr. Cohen back down to 60 in February 1970. These are numbers ladies and gentlemen. Just read out anything you want to read out." (Matter in parentheses supplied.)

As was made clear in the course of the argument on Cohen's motion for judgment of acquittal (1705-1724), as of October 1969 the press releases claimed only 49 franchises sold instead of the 102 the prosecutor talked about.

The court's view that the jury, which asked for the press releases during its deliberations, could see the situation for themselves, is no answer as counsel pointed out to the court (1708-1709). For all anyone knows, the jury uncritically accepted the prosecutor's reading of the releases and concluded that Cohen, like Deutsch, had grossly misrepresented the number of franchises sold.

In the course of summation, the prosecutor claimed, again with no record support, that as of April 6, 1970 when the last press release was issued, the company was "losing money" and franchises were being cancelled "right and left" (1471). He contended these "facts" should have been stated in 31g (1471-1472). But Kally's vague testimony about losses the company sustained was excluded by the

court (930-932) and Brodcorb, the only other witness on the subject could not say that the loss had occurred as of April, 1970 (1169-1170). Moreover, there was not only no testimony that contracts were being cancelled left and right, but there was no evidence that the 210 figure inGX 31g had not taken into account the very few cancellations testified to up to April 6, 1970 by Faris, Kally and Brodcorb, the only witnesses on the subject (1276, 924-926, 1159).

Finally, the prosecutor told the jury in the absence of any evidence that Cohen knew what Deutsch and Duboff were doing with the 10,000 shares in the March 11, 1969 offering, that Cohen had never told Malmon that Deutsch and Duboff were directing the allocation of the 10,000 shares involved in the March 11, 1969 offering and that Morganstin and Harris were allocated shares (1524-1525).

While the prosecutor's improper statements were not as blatant as those condemned in *United States v. White*, 486 F.2d 204 (2 Cir. 1973) and the cases therein mentioned, they nevertheless, particularly in light of the court's inaction, assured Cohen's conviction on a basis not consistent with the evidence.

POINT X

THE TRIAL JUDGE ERRED IN HIS CHARGE AND IN HIS RULINGS ON REQUESTS.

Apart from the all-or-nothing charge on the conspiracy count described in Point II, *supra*, the court ignored the centering of the information on the March 11, 1969, offering circular and treated the case, even as to count 4 which had nothing to do with manipulation, as if the information had clearly charged a plot to defraud the Denver Funds (1585). The court told the jury (1609):

> "It is the government's contention, however, that Mr. Cohen under Count 1 was a party to the alleged conspiracy to manipulate the price of Richard Packing Company stock and under Counts 2, 3 *and 4*, the substantive counts, aided

and abetted his co-defendants in achieving the same objective." (emphasis supplied)

This was gross error which was compounded by the Court's Pinkerton charge to which the defendants excepted (1637).

The court in detailing the government's contentions stated (1562):

> "Thus, the government contends, that the press release of April 6, 1970, Government's Exhibit 31G, which states in part that Richard Packing had sold 210 franchises by that date, was false, because the company had sold a smaller number. The government also contends that this statement was misleading because it omitted to state that a number of franchises had by that time been cancelled.
>
> "The government also contends that the statement was misleading because it did not state that as of this time, the franchise operation was losing money. The government made other contentions, which I will leave to your recollection.
>
> "The defendants contend that they believed the statements they made as to the number of franchises sold to be true, and that the so called projections, that is, as to the future earnings of the company, were mere estimates.
>
> "If you find that the defendants believed the statements they made as to the number of franchises sold to be true, and that the projections as to future earnings were made in good faith, you cannot find any criminal intent in the making of those statements, even if the figures later proved to be wrong."

This was unfair in two respects.

In the first place, as pointed out by counsel, the defense contentions as stated by the court did not meet the government's contentions (1620-1621, 1635-1636). And in

the second place, the charge adopted the notion stressed by the government in summation, and not supported by the evidence, that Richard Packing was losing money as of April 6, 1970 (1471). An attempt to prove that through Kally had been blocked by the court (930-932) and Brodcorb had been unable to say when in 1970 the loss occurred (1169-1170). Cohen's post-charge request for an instruction which would have left the matter for the jury's recollection of the evidence was refused (1649-1650).

The court further charged that false representations meant *any* representations regarding past or present facts (1561) which could have permitted the jury to convict on the government's mention in summation (1472-1473) of the discrepancy in description of the capabilities of dune buggies.

In the circumstances of this case, the court by merely reading to the jury, over objection (1449-1450) the statutory definition of an underwriter (1594-1596) removed the factual issues as to the roles of Shwidock and Kelly Andrews and Cohen's intent in connection with the offering circular from the jury's consideration.

In ruling on requests, the court erred in several respects.

In the first place, the court refused Cohen's supplemental request number 9 (at 1725, submitted after the prosecution summation, which was to the effect that there was no evidence that Cohen had inherited any money on the death of his father (1618).

In the second place, the court refused Cohen's supplemental requests numbers 3 and 8 (at 1728-1729) which were to the effect that no adverse inference could be drawn against Cohen from the fact that Deutsch and Duboff used Morganstin and Harris as nominees (1448, 1618). When the request was renewed after the prosecutor had emphasized during summation the fact that neither Morganstin nor Harris had rendered any services to Richard Packing (1518), the request was again refused

(1539, 1541), thus leaving the totally unfair implication that Cohen had done something improper in granting stock options to the nominees of Deutsch and Duboff in September 1968, a month before the 10,000 share offering was even contemplated.

The charge in this case did nothing to counteract the egregious errors which characterized this trial and which made the trial grossly unfair as to Cohen.

CONCLUSION

For the reasons hereinabove set forth and set forth in the briefs of Cohen's co-appellants to the extent applicable, the judgment should be reversed and a new trial should be granted.

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